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In the Supreme Court of the United States

OCTOBER TERM, 1974

ROBERT W. BLANCHETTE, ET AL., TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, DEBTOR, APPELLANTS

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL.

UNITED STATES RAILWAY ASSOCIATION, APPELLANT

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL.

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE FEDERAL PARTIES

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE FEDERAL PARTIES[1]

1. In our opening brief,[2] we advanced two independent arguments for reversing the district court's narrowly phrased injunction against enforcement of Section 304(f) of the Rail Act: (1) that, as a matter of law, compelled loss operations pending implementation of the final system plan would not constitute a taking of the property of the claimants against the bankrupt railroad estates and (2) that a remedy for any otherwise uncompensated taking would in any event be available under the Tucker Act. We have now concluded that there are certain possible circumstances in which the first of these arguments would not apply.

Our argument with regard to interim erosion was based upon two propositions, one of law and one of fact: that the claimants against a bankrupt railroad may constitutionally be compelled to bear the burden of continuing its operations in the public interest for a reasonable time pending substantial good faith efforts to restore it to financial viability, and that the Rail Act represents such an effort. We still believe those propositions to be sound.

But necessarily implicit in our argument was the unstated premise that the final system plan would be

[1]This reply brief is submitted on behalf of all federal parties other than the United States Railway Association, a federally-established nonprofit corporation, which is represented by separate counsel.

[2]We inadvertently failed to refer to Nos. 74-165 and 74-167 in the caption of our opening brief. We support the position of the appellants in those cases to the extent that they urge reversal of the judgment below. See Rule 10(4) of the Rules of this Court.

implemented within a reasonable time. We have no reason to question the factual accuracy of that assumption, but it may nevertheless prove false.[3] Difficulties now unforeseen and unanticipated could in fact delay final implementation of the final system plan. For example, Congress could, in theory, successively disapprove several proposed final system plans. Thus, whatever the probabilities, the parties and this Court have no absolute assurance that the plan will in fact be implemented within a reasonable time. For that reason, we have determined that a taking of property through interim erosion, although extremely unlikely, remains a theoretical possibility under the Rail Act.

Accordingly, we believe that an injunction preventing the Association from denying applications for discontinuance of service under Section 304(f) in those circumstances might be appropriate unless, as we contend, a remedy for any otherwise uncompensated taking will be available under the Tucker Act.[4] We are therefore per-

[3]We note that a bill (S. 4003) has been introduced to extend by 120 days the deadline for submitting the final system plan to Congress. See 120 Cong. Rec. S16619 (daily ed., September 16, 1974). In our view, such a brief extension cannot significantly affect the legal rights of the parties.

[4]The district court's injunction bars the Association from denying any application for a "reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the United States Constitution" (J. App. 82). We assume that, in making such a determination, a court would of course consider the availability under Section 303 of the Rail Act of compensation for interim erosion amounting to a taking. See pp. 38-39 of our opening brief. We therefore believe an injunction of that kind, although not necessarily in those identical terms, would, in the absence of any Tucker Act remedy, cure any constitutional defect by preventing any takings through interim erosion for which there would be no just compensation.

suaded that this Court must reach and decide the "Tucker Act question" presented by these appeals.

2. We showed in our brief as appellees in No. 74-166 (pp. 16-24) that the question whether the final conveyance provision (Section 303) of the Rail Act will in fact effect a taking of property is not ripe for adjudication. Unlike appellant Smith in No. 74-166, appellees Connecticut General Insurance Corporation, *et al.* in these cases do not contend that the final conveyance provision will in fact effect a taking of property. Their contention is instead (Br. 109-112), that the Rail Act itself fails to furnish assurance of just compensation for any taking effected by the final conveyance and that that failure presents an alternative ground for affirming the district court's injunctions against certification of the final system plan under Section 209(c) and enforcement of Section 303. See, also, pp. 36-58 of the brief for appellee Penn Central Company. We disagree. Any failure of the Rail Act itself to provide assurance of just compensation would at most provide, even in the absence of a Tucker Act remedy, a basis only for temporarily enjoining certification pending a judicial determination of the fairness and equity of the total amount of consideration to be made available under the plan. See p. 39 of our brief as appellees in No. 74-166.

But we agree with appellants Blanchette, *et al.* (see pp. 48-54 of their opening brief), that the question whether a remedy for any otherwise uncompensated taking effected by the final conveyance will be available under the Tucker Act is now justiciable.[5] This conclusion is

[5]Of course, we maintain our contention that any assessment of the respective values of the rail properties to be conveyed and the securities to be received in return would at this point be uninformed and premature. See pp. 16-24 of our brief as appellees in No. 74-166.

reinforced by the Special Court's determination that the reorganization process prescribed by the Rail Act satisfies the statutory standards of fairness and equity if but only if this Court holds that the Court of Claims will have jurisdiction to try taking claims arising out of the final conveyance. See *In the Matter of Penn Central Transportaion Company, et al.*, Nos. 74-8, *et al.*, decided September 30, 1974 (Special Court), slip op. of Judge Friendly, pp. 111-116. The Tucker Act question raised by appellants Blanchette, *et al.* is, however, indistinguishable from the question whether a Tucker Act remedy will be available for any takings resulting from interim erosion. No one has suggested any reading of the Rail Act which would deprive the Court of Claims of jurisdiction over suits based upon some but not all forms of alleged takings arising under the Rail Act. The Tucker Act question presented by these appeals is therefore single and indivisible - *i.e.*, whether the Court of Claims has jurisdiction to hear just compensation suits based upon alleged takings arising under the Rail Act. We showed in our opening brief (pp. 39-48) that the Court of Claims does possess such jurisdiction.

3. Appellees[6] contentions against the availability and adequacy of a Tucker Act remedy are fully answered in the opinion of the Special Court (*In the Matter of Penn Central Transportation Company, et al., supra,* slip op. of Judge Friendly, at pp. 83-111) and the reply brief for appellant United States Railway Association, upon both of which we rely.

[6]"Appellees" refers to the parties appearing as appellees in all three cases (Nos. 74-165, 74-167, and 74-168).

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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